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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

10 JANA OVERBO and NICOLE BROWN-BOOKER

Plaintiffs,

vs.

**LOEWS CALIFORNIA THEATRES, INC.
dba AMC LOEWS METREON 16 IMAX;
WESTFIELD CORPORATION; and DOES
1-10, Inclusive**

Defendants.

CASE NO. 4:07-cv-05368 WDB

**Assigned to Hon. Judge Wayne D.
Brazil**

**DEFENDANT WESTFIELD, LLC'S
NOTICE OF MOTION FOR ORDER
DECLINING SUPPLEMENTAL
JURISDICTION**

**Filed Concurrently With Defendant's
Memorandum of Points and Authorities In
Support of Motion For Order Declining
Supplemental Jurisdiction**

Date: March 19, 2008
Time: 1:30 p.m.

Complaint Filed: October 19, 2007
Trial Date: TBD

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on March 19, 2008 at 1:30 p.m., or as soon thereafter as the matter may be heard in the above-entitled court, located at 1301 Clay Street, Suite 400S, in Oakland, California, Defendant Westfield, LLC (formerly Westfield Corporation, Inc.), will and hereby does move the Court, pursuant to 28 U.S.C. § 1367(c), for an order

1 declining to exercise supplemental jurisdiction over the state law claims of Jana Overbo and
2 Nicole Brown-Booker ("Plaintiffs").

3 This Motion is and will be based on the grounds that retaining jurisdiction over state
4 law claims in ADA lawsuits is inappropriate because, among other reasons, Plaintiffs' claims
5 raise novel or complex issues of state law, and these state law claims substantially
6 predominate over the claims over which the district court has original jurisdiction. The
7 Court may exercise its discretion to dismiss Plaintiffs' state law claims because Plaintiffs'
8 state law claims raise novel and complex issues regarding the interpretation of California's
9 Unruh Civil Right Act ("Unruh Act"), Disabled Persons Act ("DPA") and the respective
10 statutory penalties that raise the potential for conflicting state versus federal standards of
11 review.

12 This Motion will be based on this Notice of Motion and Memorandum of Points and
13 Authorities, and the pleadings and papers on file herein, and such further arguments and
14 papers as may be presented to the Court before or during the hearing.

15 Dated: February 12, 2008

KATTEN MUCHIN ROSENMAN LLP
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18
19 /s/ Thomas J. Leanse
20 Attorney for Defendant
21 WESTFIELD, LLC

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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA**

JANA OVERBO and NICOLE BROWN-BOOKER

CASE NO. 4:07-cv-05368 WDB

**Assigned to Hon. Judge Wayne D.
Brazil**

Plaintiffs,

vs.
LOEWS CALIFORNIA THEATRES, INC.
dba AMC LOEWS METREON 16 IMAX
WESTFIELD CORPORATION; and DOI
1-10, Inclusive

**DEFENDANT WESTFIELD, LLC'S
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
MOTION FOR ORDER DECLINING
SUPPLEMENTAL JURISDICTION**

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 **A. Summary of Argument**

4 Defendants move this Court to decline exercising supplemental jurisdiction over the
5 state law claims raised by Jana Overbo and Nicole Brown-Booker's ("Plaintiffs") complaint
6 on record with the Court (the "Complaint"). Plaintiffs' Complaint asks this Court to
7 adjudicate a federal claim for injunctive relief and two state law claims for which the parties
8 are entitled to a jury, that also raise novel and complex issues regarding state law. Arguably,
9 the evidence for federal and state claims relate to different time periods, to wit, the state law
10 claims for damages involve pre-filing issues whereas the ADA claim for injunctive relief
11 will focus on the conditions at the time of trial. This Court may decline to exercise
12 supplemental jurisdiction over state law claims if any of the following apply:

- 13 (1) The claim raises a novel or complex issue of state law: Plaintiffs' state law
14 claims under the Unruh Civil Rights Act ("Unruh Act") and Disabled Persons
15 Act ("DPA") raise novel and complex issues of state law regarding varying
16 burdens of proof and appropriate damages that other courts have previously
17 determined are complex and best left to state courts to address. Significantly,
18 federal ADA and state statutory laws on these issues have disparate burdens of
19 proof – unlike the federal ADA claim that permits only injunctive relief, the
20 state claims permit disabled plaintiffs monetary recovery in addition to
21 injunctive relief – that creates confusion as to which damages are proper where
22 federal and state claims overlap. See, Botosan v. Fitzhugh, 13 F. Supp. 2d
23 1047 (S.D. Cal. 1998), and Doran v. Embassy Suites Hotel, 2002 WL 1968166
24 (N.D. Cal. Aug. 26 2002);
25 (2) The state law claim(s) substantially predominate over the federal claims:
26 Plaintiffs' state law claims substantially predominate over the sole federal
27 claim under Title III of the ADA because the state law claims permit statutory

monetary damages whereas the federal ADA claim permits injunctive relief only. Further, all but Plaintiffs' ADA claim are based on state laws. Significantly, the standard for injunctive relief differs in federal and state courts; specifically, in federal court injunctive relief is proper only if plaintiff can show the alleged violations exist or there is a threat of future injury at the time of trial whereas in state court, injunctive relief is proper so long as plaintiffs can show a history of the alleged violations. See, City of Los Angeles v. Lyons, 461 U.S. 95 (1983) and Estes v. Rowland, 14 Cal.App.4th 508 (1st Dist. 1993);

- (3) The district court has dismissed all claims over which it has original jurisdiction; or
- (4) If there is some other exceptional and compelling reason to decline jurisdiction. 28 U.S.C. § 1337(c): The principles of comity and the substantial interest in allowing state courts to determine the proper interpretation of state law also support this Court in refraining from exercising supplemental jurisdiction over Plaintiffs' state claims.

Given the foregoing, this Court is well within its discretion to decline exercising supplemental jurisdiction over Plaintiffs' state law claims and Defendant asks this Court to do so.

II. FACTUAL BACKGROUND

This case arises out of Plaintiffs' allegations of accessibility barriers in violation of the ADA at the AMC Loews Metreon 16 IMAX theatre situated at 101 4th Street in San Francisco, California (the "Property"). According to the Complaint, Plaintiffs are persons with physical disabilities and require the use of wheelchairs to ambulate.¹ Plaintiffs allege that on several different occasions between January 2006 to May 2007, Plaintiffs attempted to visit the Property separately and jointly but have encountered barriers to access that

¹ Complaint, ¶ 1.

1 prevented Plaintiffs from enjoying full and equal access to the Property.² Based on these
 2 purported barriers, Plaintiffs filed their complaint on October 19, 2007. Specifically,
 3 Plaintiffs allege three causes of action:

- 4 1) Denial of full and equal access to the Property in violation of the Disabled Persons
 Act, Cal. Civ. Code § 54 ff, and the California Health & Safety Code §§ 19955, *et*
 seq.;
- 5 2) Violation of the Unruh Civil Rights Act, Cal. Civ. Code §§ 51 and 52; and
- 6 3) Violation of the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101.

7 Plaintiffs are seeking statutory and treble damages under the first cause of action, statutory
 8 damages under the second cause of action, and injunctive relief under the ADA.

9

10

11

12 **III. PURSUANT TO THE COURT'S DISCRETIONARY AUTHORITY, THIS**
COURT SHOULD DECLINE TO EXERCISE SUPPLEMENTAL
JURISDICTION OVER PLAINTIFFS' PREDOMINANT STATE LAW
CLAIMS

13

14 **A. Legal Standard**

15 "It is a fundamental precept that federal courts are courts of limited jurisdiction."
 16 Owen Equipment & Erection Co. v. Kroger, 437 U.S. 365, 374 (1978). Pursuant to Fed. R.
 17 Civ. P. 12(b)(1), a party may challenge the court's subject matter jurisdiction on the basis
 18 that supplemental jurisdiction is improper according to 28 U.S.C. § 1337(c). Sparrow v.
Mazda American Credit, 385 F. Supp. 2d 1063, 1066 (E.D. Cal. 2005). A challenge to
 19 jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1) can be either facial, confining the inquiry to
 20 allegations in the complaint, or factual, permitting the court to look beyond the complaint.
 21 White v. Lee, 227 F.3d 1214, 1242 (9th Cir. 2000). For facial inquiries, the court need look
 22 no further than the allegations set forth in the complaint to determine whether to extend
 23 supplemental jurisdiction. Id. Once a party challenges subject matter jurisdiction, the non-
 24 moving party then bears the burden to establish that jurisdiction exists. Kokkonen v.
Guardian Life Ins. Co., 511 U.S. 375, 378 (1994).

28 ² Complaint, ¶¶ 11-15.

1 i. **Federal Courts Are Courts Of Limited Jurisdiction And May
2 Decline Exercising Supplemental Jurisdiction If The Claim Raises
3 A Novel Or Complex Issue Of State Law; State Law Claim(s)
4 Substantially Predominate Over Federal Claims; The District
Court Has Dismissed All Claims Over Which It Has Original
Jurisdiction; or There Is Some Compelling Reason To Decline
5 Jurisdiction**

6 It is well settled that district courts may decline to exercise supplemental jurisdiction
7 over state law claims if any one of the following applies: (1) the claim raises a novel or
8 complex issue of state law; (2) the state law claim(s) substantially predominate over the
9 federal claims; (3) the district court has dismissed all claims over which it has original
10 jurisdiction; or (4) if there is some other exceptional and compelling reason to decline
11 jurisdiction. 28 U.S.C. § 1337(c); see, e.g., Sparrow, 385 F. Supp. 2d 1063 at 1070-71.
12 Further, district courts have discretion to decline supplemental jurisdiction under § 1337(c)
13 even when they have the power to exercise it. Mendoza v. Zirkle Fruit Co., 301 F.3d 1163,
14 1174 (9th Cir. 2002). In deciding whether to exercise supplemental jurisdiction, the court
15 should consider the interest of judicial economy, convenience, fairness and comity. City of
Chicago v. International College of Surgeons, 522 U.S. 156, 173 (1997); Smith v. Lenchey,
16 263 F. 3d 972, 977 (9th Cir. 2001).

17 In the present matter, three of the four factors set forth above apply such that this
18 Court should exercise its discretion to decline supplemental jurisdiction. First, Plaintiffs'
19 state law claims raise novel and complex issues of state law that other courts have noted are
20 better left for state courts to interpret. See, e.g., Cross. v. Pacific Coast Plaza Investments,
21 L.P., Slip Copy, 2007 WL 951772 (S.D. Cal. 2007); Molski v. Mandarin Touch Restaurant,
22 359 F.Supp.2d 924 (C.D. Cal. 2005); Peters v. CJK Associates, LLC, Slip Copy, 2003 WL
23 24205920 (E.D. Cal. 2003). Second, the state law claims predominate over the federal
24 claims: two of Plaintiffs' three causes of action are state law claims and the damages under
25 the state law claims substantially predominate the damages sought under the federal claims.
26 Specifically, Plaintiffs' state law claims – alleged violation of the Unruh Act and DPA –
27 would permit Plaintiffs to recover monetary compensation whereas the federal ADA claim
28

1 permits injunctive relief only (in addition to attorneys fees and costs). Third, compelling
 2 reasons such as the principles of comity, interest of discouraging forum shopping, and
 3 promotion of judicial economy are grounds for this Court to decline supplemental
 4 jurisdiction.

5 **B. Argument**

6 **i. Plaintiffs' Claims Under The Unruh Act And DPA Present Novel
 And Complex Issues Of Law Due To The Ambiguity Of The
 Language Regarding The Proper Measure Of Damages And The
 Apparent Discrepancy Between Damages Under State Law Claims
 And The Federal ADA Claim Such That This Court Should Decline
 To Exercise Supplemental Jurisdiction**

10 There is a long line of cases where courts have held it is proper to decline
 11 supplemental jurisdiction given the novel and complex issues raised by the Unruh Act and
 12 DPA claims. See, Molski, 359 F. Supp. 2d 924 (C.D. Cal. 2005); Brick Oven Restaurant,
 13 406 F.Supp.2d 1120 (S.D. Cal. 2005); Morgan v. American Stores Co. LLC, Slip Copy,
 14 2007 WL 1971945 (S.D. Cal. 2007); Cross, Slip Copy, 2007 WL 951772 (S.D. Cal. 2007);
 15 Peters v. CJK Associates, LLC, 2003 WL 24205920 (E.D. Cal. 2003) [in each case, the
 16 court declined to exercise supplemental jurisdiction over plaintiffs' state law claims identical
 17 to the state law claims presented in the instant action]. One reason the state law claims are
 18 complex is the ambiguity in the language regarding the proper measure of damages. Molski,
 19 359 F. Supp. 2d at 936; Brick Oven, 406 F. Supp. 2d 1120 (S.D. Cal. 2005) [both courts
 20 noted that the damages provisions in the Unruh Act and DPA are ambiguous]. Specifically,
 21 the Unruh Act provides damages for "each and every offense" whereas the DPA provides
 22 damages solely for "each offense." Cal Civ. Code §§ 52(a) and § 54.3(a).

23 Thus, when a Plaintiff claims relief under both the Unruh Act and DPA, the court
 24 must interpret which standard of damage measurement – either damages for "each and every
 25 offense" or "each offense" – is proper. The difference in this statutory language makes it
 26 difficult to determine what measure of damages are appropriate and this is a concern that
 27 district courts have found confusing. In fact, two district courts reached the exact opposite

1 conclusion when reading these provisions: In Botosan v. Fitzhugh, 13 F. Supp. 2d 1047
 2 (S.D. Cal. 1998) the court found that recovery of daily damages was proper; reading the
 3 exact same provisions, the Northern District court disagreed with the Botosan court and held
 4 that daily damages were not authorized by statute in Doran v. Embassy Suites Hotel, 2002
 5 WL 1968166 (N.D. Cal. Aug. 26 2002).³

6 a. **Plaintiffs' Burden Of Proof Required Under Federal Law
 7 Claims And State Law Claims Differ And This Difference
 8 Has Created A Discrepancy In Federal And State Courts'
 9 Interpretation Of These Claims Which Underscores That
 These Issues Raise Novel And Complex Questions Regarding
 State Law**

10 Even before the court can arrive at the specific damage provisions to determine a
 11 proper award, there is yet another hurdle of legal complexity that further compels this Court
 12 to decline supplemental jurisdiction: The burden of proof a plaintiff bears under the federal
 13 versus state claims are significantly different and this difference creates greater confusion as
 14 to whether particular damages are proper for overlapping state and federal claims. Pursuant
 15 to the Ninth Circuit's interpretation of the ADA, plaintiffs do not need to establish
 16 discriminatory intent to prevail on a Title III claim. 42 U.S.C. § 12182(b)(2)(A)(iv); see
 17 Lentini v. California Center for the Art, 370 F.3d 837, 846-47 (9th Cir. 2004) [the court
 18 noted, "no showing of intentional discrimination is required where the Unruh Act violation is
 19 premised on an ADA violation"]. Moreover, Title III plaintiffs may seek only injunctive
 20 relief. In contrast, the Unruh Act specifically requires a showing of discriminatory intent,
 21 and Unruh Act plaintiffs that are able to show a discriminatory intent are able to recover
 22 statutorily determined monetary damages. Cal. Civ. Code § 51; see Harris v. Capital Growth
 23 Investors XIV, 52 Cal.3d 1142, 1175 (1991) [court held that "a plaintiff seeking to establish
 24 a case under the Unruh Act must plead and prove intentional discrimination in public
 25 accommodations in violation of the terms of the Act"].

26 ³ The court apparently must also choose which cause of action plaintiffs can recover under since
 27 recovery under the DPA and the Unruh Act are mutually exclusive. As stated in Cal. Civ. Code
 28 § 54.3(c), "A person may not be held liable for damages pursuant to both this section and Section 52
 for the same act or failure to act."

1 These differing standards create a problem because under Cal. Civ. Code § 51(f), a
2 violation of the ADA also qualifies as a violation of the Unruh Act: Cal. Civ. Code § 51(f)
3 states, “[a] violation of the right of any individual under the Americans with Disabilities Act
4 of 1990 (Public Law 101-336) shall also constitute a violation of this section.” Thus, a
5 plaintiff could assert a claim under the Unruh Act and effectively bypass the requirement to
6 show intentional discrimination by making a prima facie showing of an ADA violation that
7 does not require intentional discrimination. By doing so, plaintiffs can then seek monetary
8 damages under the state law though the same plaintiff would be limited to only injunctive
9 relief under the federal law. Therein lies the problem.

b. Federal And State Courts Have Been Unable To Agree On The Proper Interpretation Of Plaintiffs' State Law Claims; This Disjunction Illustrates That These Issues Are Novel And Complex And Therefore Best Left To A State Court's Review

Courts are no less troubled by this confusing overlap. In Lentini, the Ninth Circuit held that “no intentional discrimination is required where the Unruh Act violation is premised on an ADA violation[,]” disregarding the fact that the Unruh Act requires that plaintiffs meet the evidentiary burden of establishing discriminatory intent. Thus, whereas the Unruh Act normally requires a showing of discriminatory intent for a plaintiff to obtain monetary damages, under Lentini, so long as the ADA violation serves as the basis for the Unruh Act claim, plaintiffs can ostensibly evade the intent requirement. In Gunther v. Lin, 144 Cal.App.4th 223, 256 (Cal. App. 2006), the California appeals court disapproved of this discrepancy and stated, “[W]e cannot consider ... Lentini to be [an] accurate statement[] of our own state law and we respectfully decline to follow [it].”

23 Gunther thus threw yet another wrench in this confusing morass because it
24 underscores the fact that plaintiffs in federal rather than state courts may ostensibly have an
25 easier battle to fight, but the court of appeal's decision does not carry the authority to require
26 federal courts to reconsider how to evaluate ADA versus state law claims. Thus, under the
27 current dichotomy district courts must follow the Ninth Circuit's decision in *Lentini* wherein

1 plaintiffs could recover monetary damages even absent a showing of intentional
 2 discrimination whereas state courts must follow state precedent which affirmatively requires
 3 a showing of intentional discrimination. Put simply, the case law on this issue is
 4 complicated, inconsistent, and represents an issue that should be addressed and resolved by
 5 state courts.

6 Following Gunther, another district court rejected the state court's holding. Wilson v.
 7 Haria and Gogri Corp., 479 F.Supp.2d 1127, 1137 (E.D. Cal. 2007). However, in its
 8 disapproval of the court's final disposition in Gunther, the Wilson court nonetheless
 9 conceded that the "state of the law is less than clear" regarding the proper interpretation of
 10 the Unruh Act and the DPA. Thus, the holding in Wilson provides no additional insight into
 11 the proper interpretation and application of these statutes. In fact, if anything, the court's
 12 holding underscores the confusion because, "regardless of whether [Gunther] was correctly
 13 or incorrectly decided ... it 'show[s] that federal and state interpretation of the Unruh Act
 14 have diverged to such a degree that declining supplemental jurisdiction is appropriate[.]'"
 15 Morgan, Slip Copy 2007 WL 1971945 at *3 quoting Cross, 2007 WL 951772.

16 Other courts agree that the disparate holdings in Gunther and Wilson highlight rather
 17 than resolve the problem:

18 "As the circumstances presently exist, this court is faced with
 19 irreconcilable authorities based on the current status of state law. On
 20 the one hand, the court is bound by *Lentini*[.] [...] On the other hand,
 21 according to *Gunther*, *Lentini* is an incorrect interpretation of the Unruh
 22 Act in this regard. [...] This court cannot adhere to the teachings of both
 23 *Lentini* and *Gunther*. [...] [C]omity interests have become more, not
 24 less, compelling over time as the courts struggle to resolve what is at the
 25 moment an irreconcilable tension between the ADA and the Unruh Act.
 In sum *Lentini* and *Gunther* show that federal and state interpretation of
 the Unruh Act have diverged to such a degree that declining
 supplemental jurisdiction is appropriate[.]" Cross, 2007 WL 951772 at
 *5.

26 Yet another court noted the potential inequity created by this discrepancy between state and
 27 federal holdings:

1 "It is for the state courts, not federal courts, to determine the proper
 2 interpretation of the Unruh Act and its effects on plaintiff's state law
 3 claims. If this Court maintains jurisdiction over Plaintiff's state law
 4 claims, the Court will be bound by *Lentini*[.] However, if Plaintiff had
 5 filed this case in [the state court], that court would be bound by *Gunther*
 Copy, 2007 WL 4144995 at *3 (S.D. Cal. 2007).

6 Given the current "irreconcilable tension" between state and federal courts' interpretation of
 7 this, it is well within this Court's discretion to deny supplemental jurisdiction as the
 8 questions presented raise complex issues of state law best left to state courts to resolve. As
 9 such, declination of supplemental jurisdiction would be proper.

10 **ii. Because Plaintiffs' State Claims Predominate Over Its Federal
 11 Claims In Terms of Damages Sought, This Court Should Exercise
 12 Its Discretion To Decline Supplemental Jurisdiction**

13 This court may also properly decline supplemental jurisdiction over Plaintiffs' state
 14 law claims because the state law claims, in particular the damages sought, predominate over
 15 Plaintiffs' federal claims. In United Mine Workers v. Gibbs, 383 U.S. 715, 726 (1966), the
 16 Supreme Court noted that state issues may substantially predominate "in terms of proof, of
 17 the scope of the issues raised, or of the comprehensiveness of the remedy sought[.]" Though
 18 Gibbs predates 28 U.S.C. § 1337(c), the Ninth Circuit has held that the § 1337(c) inquiry
 19 should be informed by Gibbs. See, Acri v. Varian Assocs., Inc., 114 F. 3d 999, 1001 (9th
 20 Cir. 1997). Using the criteria set forth in Gibbs, it is clear that Plaintiffs' state law claims
 21 substantially predominate over the federal claims.

22 **a. The State and Federal Requirements For Injunctive Relief
 23 Differ Such That Plaintiffs' Evidentiary Burdens Of Proof
 24 Would Differ For The State and Federal Claims**

25 Two out of the three causes of action plead by Plaintiffs are state law claims. As an
 26 initial matter, the requirements for Plaintiffs' request for injunctive relief differ under the
 27 federal and state standards. Under federal laws, Plaintiffs have standing to bring claims for
 28 injunctive relief only where there is a threat of future injury or harm. City of Los Angeles v.

1 Lyons, 461 U.S. 95, 111 (1983) [“an injunction ... is unavailable absent a showing of
 2 irreparable injury, a requirement that cannot be met where there is no showing of any real or
 3 immediate threat that the plaintiff will be wronged again –a “likelihood of substantial and
 4 immediate irreparable injury.”]. The issue of whether there is a threat of future harm
 5 depends on the circumstances at the time of trial. A plaintiff that cannot establish the
 6 likelihood of future injury does not have standing to sue for injunctive relief. Id.

7 In Lyons, the plaintiff sought an injunction to prevent Los Angeles police officers
 8 from using control choke holds, except in situations in which an individual appeared to
 9 threaten to use immediate deadly force. Id. at 98. The Supreme Court held that the plaintiff
 10 lacked standing to sue for injunctive relief because he was could not demonstrate that he was
 11 “likely to suffer future injury from the use of choke holds by police officers.” Id. at 105. The
 12 Court explained that in seeking injunctive relief, the mere fact that one has been injured in
 13 the past is insufficient to satisfy the standing requirement.⁴ In Lyons, the Supreme Court
 14 focused on the redressability element of standing, which requires the proposed injunctive
 15 relief to be likely to redress the plaintiff’s injury. “[Lyons] is based on the obvious
 16 proposition that a prospective remedy will provide no relief for an injury that is, and likely
 17 will remain, entirely in the past.” Id. Indeed, every court to consider the ADA’s standing
 18 requirements has held that a private litigant must prove standing by showing a risk of *future*
 19 harm.⁵ Thus, under the federal claim, Plaintiffs’ evidentiary burden would be show that non-
 20
 21

22 ⁴ Id. at 95-96. See also O’Shea v. Littleton, 414 U.S. 488, 495-96 (1974) (“past exposure to illegal
 23 conduct does not in itself show a present case or controversy regarding injunctive relief... if
 24 unaccompanied by any continuing, present adverse effects”); Friends of the Earth, Inc. v. Laidlaw
 Envtl. Servs. (TOC), Inc., 528 U.S. 167 (2000) (citing Lyons approvingly); Am. Postal Workers
 Union v. Frank, 968 F.2d 1373 (1st Cir. 1992) (“[Lyons] reaffirmed the principle that past exposure
 25 to harm will not, in and of itself, confer standing upon a litigant to obtain equitable relief absent a
 sufficient likelihood that he will again be wronged in a similar.” [internal quotation marks omitted]).
 26 ⁵ See, e.g., Shotz v. Cates, 256 F.3d 1077 (11th Cir. 2001) (ruling that plaintiffs lacked standing where
 27 they had only visited non-compliant courthouse once in two-year span); Plumley v. Landmark
 Chevrolet, Inc., 122 F.3d 308, 312 (5th Cir. 1997) (holding that ADA claim under Title III did not
 survive plaintiff’s death); Aikins v. St. Helena Hosp., 843 F.Supp. 1329, 1333-34 (N.D. Cal. 1994)
 28 (no standing because no showing that plaintiff would use hospital again or that it would discriminate
 against plaintiff again).

1 compliant conditions exist *at the time of trial* in order to show a need for prospective relief in
 2 the form of an injunction.

3 On the other hand, a litigant seeking relief under the state laws need only show a
 4 history of past harm that *may* reoccur: As the court noted in Estes v. Rowland, 14
 5 Cal.App.4th 508, 525 (1st Dist. 1993), “injunctive relief ... may be granted where past
 6 practices have been stopped in anticipation of suit, and may be resumed if there is no
 7 injunction to prevent it.” Moreover, the language of the Unruh Act and DPA permit the
 8 award of statutory monetary damages for pre-filing violations. Cal. Civ. Code §§ 52, 54.3.
 9 Thus, under the state disability claims, Plaintiffs may allege facts relating to conditions at the
 10 Property *prior* to commencing litigation in order to seek the statutory damages whereas the
 11 inquiry for the federal ADA claim for injunctive relief addresses only whether there is a
 12 threat of future harm. Thus, under the state claims, Plaintiffs’ could potentially prevail
 13 simply by showing that conditions at the Property were non-compliant at any time prior to
 14 filing this action.

15 Plaintiffs’ evidentiary burden therefore differs for the state and federal claims. The
 16 result works an inequity in Plaintiffs’ favor because (1) they would be permitted to bring
 17 state disability claims that provide for monetary damages and effectively bypass the
 18 requirements to show intentional discrimination (pursuant to state court interpretation of the
 19 state disability laws) and then (2) can further bypass the requirement to show a threat of
 20 future harm because the potentially available relief for the state disability claims focuses on
 21 pre-filing issues rather than conditions at the time of trial. Thus, the standards for relief are
 22 inconsistent under federal and state standards. Procedural considerations support this Court
 23 in declining to exercise supplemental jurisdiction over Plaintiffs’ state law claims.

24 Furthermore, the statutory damages potentially available to the Plaintiffs under the
 25 state law claims substantially predominate over the relief available under the ADA. Under
 26 the per violation standard of the Unruh Act or the DPA, Plaintiffs could potentially recover a
 27 minimum of \$4,000 per violation (though again, it is unclear whether that means \$4,000 per

1 day or \$4,000 per ADA violation, or some other measurement). In contrast, Plaintiffs would
 2 only be entitled to injunctive relief and attorneys' fees under the ADA. Given the
 3 disproportionate results, it is clear that the remedies under the state claims substantially
 4 predominate such that this Court should exercise its discretion to decline supplemental
 5 jurisdiction.

6 **b. Pursuant to Gibbs, Plaintiffs' State And Federal Claims Are
 7 Different In Terms Of Required Proof And Availability Of
 Jury Trial**

8 Another procedural difference between Plaintiffs' state and federal claims is that
 9 Plaintiffs seek a jury trial for their state claims whereas no jury trial is available for the
 10 federal ADA claim. See, Hobleman v. Kentucky Fried Chicken, KFC USA, Inc., 260
 11 F.Supp.2d 801, 805 (D.Neb. 2003) ("Title III of the ADA does not provide for monetary
 12 damages or, concomitantly, a jury trial, when the action is brought by a 'person who is being
 13 subjected to discrimination.'" Citing 42 U.S.C. § 12188(a)(2)). Traditionally, the right to a
 14 jury trial for a civil action is limited to actions "at law" and not for proceedings "in equity."
 15 See, C&K Engineering Contractors v. Amber Steel Co., Inc. 23 Cal.3d 1, 8 (1978). Actions
 16 "at law" include claims for monetary damages; therefore, Plaintiffs' state disability claims
 17 seeking statutory damages qualifies as an action "at law" for which Plaintiffs seek a jury
 18 trial. In contrast, Plaintiffs' federal ADA claim is limited to injunctive relief only and
 19 therefore falls under the category of a proceeding "in equity" for which a jury trial is
 20 unavailable. Case law also supports this position that an action under Title III of the ADA
 21 does not permit a jury trial. See, Hobleman, supra, and Gonzales v. National Board of
22 Medical Examiners, 225 F.3d 620, 635 (6 Cir. 2000) (Gilman, J., dissenting) (stating that it
 23 "appears doubtful" that Title III plaintiffs are entitled to jury trial as Title III permits only
 24 injunctive relief).

25 If this Court were to adjudicate just the ADA claim, this matter would consist of a
 26 simple bench trial that would look at whether accessibility issues existed at the time of trial
 27 such as to warrant the request for injunctive relief. This would be a fairly simple,
 28

1 uncomplicated inquiry. On the other hand, a jury trial for Plaintiffs' state claims would be
 2 more complicated, timely, and costly for Defendants and this Court. This procedural
 3 consideration also supports this Court from exercising supplemental jurisdiction over
 4 Plaintiffs' state claims.

5 Other courts have concluded that in cases involving the same issues before this Court,
 6 the state law claims "substantially predominate" over the remedy sought under the federal
 7 claims. See, Molski, 359 F. Supp. 2d at 937; Brick Oven, 406 F. Supp. 2d at 1131 (citing
 8 Gibbs at 726 quoted above). Given the substantial disparity in the procedural considerations
 9 and remedies available to Plaintiffs, it is well within this court's discretion to refrain from
 10 exercising supplemental jurisdiction over Plaintiffs' state law claims.

11 **iii. The Principle of Comity and Other Compelling Reasons Make It**
12 Reasonable For This Court To Decline Supplemental Jurisdiction

13 The principle of comity also supports this court from exercising supplemental
 14 jurisdiction over Plaintiffs' state law claims. There is a strong interest in allowing state
 15 courts to assess and determine the proper interpretation of the complex state laws at issue.
 16 This is particularly true given the disjunction between federal and state court interpretation
 17 of the damages provisions of the state laws, so it is imperative that district courts allow state
 18 courts to determine how best to interpret the language of the state laws. As the court in
 19 Gibbs observed, "needless decisions of state law should be avoided both as a matter of
 20 comity and to promote justice between the parties, by procuring for them a surer-footed
 21 reading of applicable law." Gibbs, 383 U.S. at 726. Therefore, California courts should be
 22 given the opportunity to interpret the language in the state statutory law in order to ensure
 23 that the parties in the present matter are provided "surer-footed" interpretation of California
 24 disability laws.

25 Another compelling reason for this court to decline exercising supplemental
 26 jurisdiction is the interest of judicial economy. Whereas the Plaintiffs may contend that it
 27 would be judicially uneconomical to require filing a new state claim, this would be the most

1 efficient use of the courts because it would allow the district court to determine the ADA
 2 issue without having to address the complicated and ambiguous state law issues. Requiring
 3 Plaintiffs to separately file their state claims does not negatively impact Plaintiffs because
 4 this case is only in its pre-discovery stage so filing a separate state claim would not work an
 5 injustice against Plaintiffs. Indeed, Plaintiffs would be free to pursue her claims, including
 6 all monetary and injunctive relief, in state court. Moreover, because Plaintiffs' evidence for
 7 the ADA claims and state law claims require different evidence, requiring Plaintiffs to file a
 8 separate state claim would not severely inconvenience or impact Plaintiffs ability to try their
 9 case. Most importantly, however, the California courts are the proper forum to determine the
 10 proper interpretation of the Unruh Act and DPA.

11 IV. CONCLUSION

12 Substantial and compelling reasons support this Court to decline exercising
 13 supplemental jurisdiction over Plaintiffs' state law claims given the disparity of evidentiary
 14 and procedural considerations between the state and federal claims in addition to the fact that
 15 Plaintiffs' state claims present novel and complex issues best left for a state court to decide:

17 State Claims	18 Federal Claim
19 Injunctive relief permitted even if there is no immediate threat of future harm or injury so long as Plaintiffs can show past harm that may reoccur. This requires evidence that barriers to access existed prior to the commencement of this action.	20 Injunctive relief proper only if there is a real threat of future harm – no injunctive relief for injury in the past. This requires evidence that barriers to access existed at the time of trial only.
21	22
23 Jury trial permitted.	24 No jury trial available.
25 Unruh Act and DPA claims raise novel and complex issues best left for state courts to adjudicate.	26 ADA claim raises a simple issue that looks only at whether the barriers to access exist at the time of trial.
27	28
State claims require evidence of pre-filing violations and adjudication of the matter would take greater time in	Federal claim would not require extensive discovery and would not over-tax this Court's resources given

1	light of the litigation procedure (e.g., 2 depositions, discovery) which would 3 tie up this Court's resources 4 unnecessarily to decide matters predominantly involving state issues.	the limited inquiry.
5	The Unruh Act and DPA require a 6 showing of intentional discrimination.	The ADA does not require Plaintiffs 7 to address the issue of intent; thus, by allowing Plaintiffs' state claims to be 8 adjudicated by a federal court, Plaintiffs could effectively and 9 unfairly avoid the additional requirement to show intent per the disparate holdings in <i>Lentini</i> and <i>Gunther</i> , <i>supra</i> .

11 In addition to the foregoing, Plaintiffs would suffer no prejudice if required to re-file
 12 the state actions in state court because this case is only at the pre-discovery phase.
 13 Accordingly, this court should decline to exercise jurisdiction over Plaintiffs' state law
 14 claims.

16 Respectfully submitted,

17 Dated: February 12, 2008

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20 /s/ Thomas J. Leanse
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 22 WESTFIELD, LLC